PUBLIC PROSECUTOR

v.

KANG CHOO HENG & ANOR.

HIGH COURT MALAYA, MUAR
RICHARD TALALLA J
[PERBICARAAN JENAYAH NO. 47-3-89]
28 AUGUST 1989

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Two accused - Admission - Caution - Failure by police officer to record statements made by accused - Effect of - Whether caution addressed to one or both accused - Whether caution and consequences explained - Difference in accent - Voluntary - Importance of opening statement by prosecution - Failure to refer to admission in opening speech - Discrepancies in police officer's testimony - Police seal - Presumptions - Possession - Ownership of car in which drugs were found - Car accessible to many persons - Custody of drugs with police - Break in the chain of evidence - Criminal Procedure Code s. 179(1) - Dangerous Drugs Act 1952, ss. 37A, 37(d), (da), 39(B).*

EVIDENCE: *Admission - Caution - Whether administered properly - Vital piece of information not recorded by arresting officer - Should be made at time information was given - Contemporaneous record - Discovery of fact - Evidence Act 1950, s. 27 - Federal Constitution, Article 8.*

The two accused were charged with the trafficking of dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 (the Act). The police set up an ambush and at about 5.00 p.m. a car bearing 2 persons was seen entering the compound of a building. The car stopped, wherein the passenger remained outside the car while the driver walked towards the building.

When the police identified themselves, it was alleged that the passenger ran towards the building and threw away a bunch of keys.

After both accused were overpowered by the police and handcuffed, Inspector G informed them that they were being arrested on cause of being suspected of having drugs. He then administered caution to both of them in Hokkien. When asked if they understood, they only nodded their heads.

A bag containing drugs was found behind the driver's seat on the floor. The Inspector then asked them 'ini apa'. The accused answered, which answer was the subject of a trial within a trial to determine its admissibility.

The questions to be determined in this case was the admissibility of the alleged admission of the 1st accused to the question 'ini apa' whether the caution was administered to each accused separately or jointly, whether the language used was understood by both the accused and whether the consequences of making the statement were explained to them.

Held:

[1] The answer allegedly given by the 1st accused to the question 'ini apa' was inadmissible as the arresting officer who was an experienced anti-drug officer failed to note it down and to make a record of it. The investigating officer, in evidence in the trial proper before the trial within the trial, made no mention of having been so informed nor did he give evidence in the trial within trial.

[2] The record is also as much for the protection of the particular officer concerned, be he the investigating or interrogating officer, as for the purpose of determining its admissibility. There is no practical difficulty of any kind hindering any officer interrogating an accused person from jotting in his note book such a vital piece of information, on which the whole case against the accused may depend. The note should be made at the time the information was given and the police officer should not forego the value of a contemporaneous record which goes so far to establish his credit as a truthful witness.

[3] Courts has a clear duty to admit under s. 27 of the Evidence Act 1950 only that part of the evidence which falls squarely within the provision of a statement leading to the discovery of a fact; it would be immensely assisted in its task if the prosecution were strictly careful to limit the evidence to the actual statement given. The evidence of Inspector G in regard to the alleged caution, the question and the answer was rejected as it was not recorded anywhere when it should have been, if in fact these several things did occur.

[4] Even if a caution had been administered, it was administered in the singular and this would have caused confusion. The accused would have been uncertain as to which of them was being addressed. There is doubt as to whether the provisions of s. 37A of the Act permits a caution to be addressed to two persons jointly and even if so permitted whether it could be uttered in the singular when administered to more than one person. *Prima facie* each accused should have been separately cautioned.

[5] Notwithstanding that Inspector G had at the time of the alleged offence been a drug officer for 8 or 9 years he found it necessary to read the prescribed caution from a card. In this regard it is significant that in answer to the alleged caution Inspector G said that the accused merely nodded. Inspector G admitted to not being a qualified interpreter - it is clear that a caution should not merely be read but also explained to the accused along with its consequences. There is no evidence that was done in this case.

[6] The circumstances of the arrest were oppressive and were not conducive to a voluntary statement being made by the accused. Certainly they could not be matched to the circumstances mentioned and standards required in the *Mokhtar Hashim* case.

[7] The failure by the prosecution to mention the alleged admission by the accused in his opening speech and only introducing it as an afterthought indicated that he would not be seeking to adduce the alleged answer in evidence.

[8] The discrepancies between the testimony of the 2 inspectors affected the credibility of Inspector G's testimony in relation to the issue of admissibility in evidence of the admission by the 1st accused.

[9] There was no incriminating evidence in either of the homes of the accused, neither was the plastic bag (which contained the drugs) examined for fingerprints.

[10] There was no evidence as to where the plastic bag was during the period intervening between the investigating officer taking delivery of the same from Inspector G and his placing them under seal in the box. Each person constituting a link in that chain should be required to speak in evidence to the safe custody of the drugs whilst in that person's possession. The investigating officer did not give any such evidence. Further, there were unsatisfactory aspects in relation to the wrapping of the exhibits in relation to the police seal or removal thereof.

[11] Inspector G's police report did not contain any reference to the 2nd accused running away or throwing of the keys nor the answer to his question 'ini apa'. Further there was no mention of him having administered a caution. This was further proof of Inspector G's evidence not being credible.

[12] The accessibility of many persons to the car in question in which the drugs were found created a doubt the benefit of which should be given to the accused. Apart from the fact that the 1st accused was driving the car and the 2nd accused was his passenger in the front seat, there was nothing to connect either accused with the car let alone the plastic bag. No personal belongings of either accused were found in the car. Despite body searches, nothing incriminating was found on them. Despite easy detection, no finger nail clippings were taken from either accused for heroin traces nor was fingerprint lifting carried out on the plastic bag.

[13] Given the fact that the accused had shortly before been told that they were being arrested under suspicion of being in possession of 'Pek Hoon' (drugs), any normal person would be in a state of panic. It is significant that before being so confronted they acted normally. If they had knowledge of the drugs in the car they would have been pale and sweating as soon as the police pounced on them. Proximity does not necessarily constitute possession.

[14] From the evidence adduced by the prosecution, it could not be deduced that either accused knew of the existence of the bag, and even if they did, that they knew of the contents.

[15] The failure by prosecution to call some or at least one of the raiding party to corroborate Inspector G's testimony attracted the adverse inference under s. 114(g) of the Evidence Act 1950.

[16] The act of absconding, as was allegedly attempted by the accused does not necessarily lead to a firm conclusion of a guilty mind. Its value would depend on the circumstances of each case. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused.

[Both accused acquitted and discharged.]

Cases referred to:

Sum Kum Seng v. PP [1981] 1 MLJ 244 ***(foll)***
PP v. Mohd. Fuzi bin Wan Teh & Anor. [1989] 2 CLJ (Rep) 341 ***(foll)***
Dato' Mokhtar bin Hashim & Anor. v. PP [1983] CLJ (Rep) 101 ***(foll)***
Munusamy v. PP [1987] CLJ (Rep) 221 ***(cit)***
Lim Seng Chuan v. PP [1977] 1 MLJ 174 ***(cit)***
Abdul Jalil bin. Abdul Satar v. PP [1991] 1 CLJ (Rep) 1 ***(cit)***
PP v. Lee Sam Thye & Anor. [1982] CLJ (Rep) 661 ***(cit)***
Ong Chong Hin v. Reg. [1959] 25 MLJ 225 ***(cit)***
PP v. Kau Joo Huat [1988] 1 CLJ (Rep) 258 ***(cit)***
Matru @ Girish Chandra v. State of U.P [1971] AIR SC 1050 ***(cit)***

Legislation referred to:

Criminal Procedure Code, ss. 179(i), 180
Dangerous Drugs Act 1952, ss. 37A, 37(da)(i), 39B
Evidence Act 1950, ss. 27, 114illus.(g)
Federal Constitution, art. 8

Other source referred to:
Halsbury's Laws of England, Vol. 37

For the prosecution - Ahmad Zaidi bin Ibrahim, DPP
For the 1st accused - Teh Poh Teik; M/s. Abdul Rahman Saad & Associates
For the 2nd accused - Christopher Fernando; M/s. Gunaretnam & Co.

JUDGMENT

Richard Talalla J:

The 2 accused were charged that on 24 January 1989 they did traffick in drugs to wit heroin bearing weight 198.5 grammes and had thereby committed an offence under s. 39B of the Dangerous Drugs Act 1952 (the Act).

A principal witness for the prosecution was Inspector Guan Beng Kang. His evidence was that on 24 January 1989 at about 4.30 p.m. he with 11 other members of the police force whom he named and with one exception identified, all armed and with handcuffs but in mufti set up an ambush near the Kong Siew Association building. At about 5.00 p.m. he saw a Toyota Corolla motor car (the car) bearing 2 persons entering the compound of the building and stopping. The driver and passenger who were seated in front alighted. The passenger walked round the back of the car to the driver where they talked and the driver handed the passenger something. The passenger remained at the driver's window whilst the driver walked in the direction of the "pintu masuk pagar" and remained there. Ten minutes later Inspector Guan facing the passenger and about 8 to 10 feet from him shouted "Polis" when the passenger immediately ran in the direction of the building *via* the front of the car. Inspector Guan caught him. A struggle ensued when the passenger threw something into the building. With the assistance of Sergeant Bujang, one of the police party, the passenger was handcuffed. Inspector Guan then took the passenger into the building to look for the object that he threw and there found a bunch of keys. Taking possession of the keys he asked the passenger whether those were the keys he threw. The reply the passenger gave was objected to as being inadmissible in evidence. The prosecution agreed and I ruled the answer to be inadmissible. Inspector Guan went on to say that he then took the passenger to the car when also he saw Inspector Sulaiman, who was a member of the police raiding party, bringing the driver to the car. Inspector Guan then carried out a body search of the driver from whose trouser pocket he recovered a wallet with some money and personal effects all of no consequence. He then body searched the passenger with similar inconsequential effect. Inspector Guan identified the driver and passenger as the 1st and 2nd accused respectively. After the body search he informed both of them that they were arrested on cause of being suspected of having drugs. He then administered a caution under s. 37A from a printed card. He administered the caution to both of them in Hokkien. He then asked whether they understood. They did not reply but only nodded their heads. He then asked one of his members to remove the handcuffs (apparently they were handcuffed from behind) and handcuffed from the front. Handing the keys to the 1st accused he directed him in Hokkien to open the boot of the car from which on examination he obtained nothing. He then directed him to open the driver's door. Nothing was seen. Then the door behind the driver's was opened. Inspector Guan saw a pink plastic bag on the floor at the back of the driver's seat. He asked the 1st accused, "ini apa." The accused answered. The learned deputy then sought a trial within trial to determine the admissibility of the answer in evidence. There was some objection but in the end Counsel for both the accused agreed to the same.

Inspector Guan went on to give evidence in the trial within trial. He repeated some of the evidence he had given at the trial proper. He produced a caution card. It was in Bahasa Malaysia and similar to the one he referred to on the day in question. He went on to say that the reaction of the 2 accused after he read the caution to them was normal. Inspector Guan said that the 1st accused did not answer the question "ini apa." Inspector Guan asked again in Hokkien. He replied "Pek Hoon". Inspector Guan asked in Hokkien whose was it. There was no reply. Inspector Guan also asked the 2nd accused who too did not reply. After he replied "Pek hoon", according to Inspector Guan, the faces of both of them were pale and they were sweating. Inspector Guan then lifted the plastic bag and opened it. In it was a canvas bag in which beneath a piece of cloth were 4 plastic packets each covered in Chinese newspaper secured by a rubber band, containing pinkish granules. Inspector Guan said that after he gave the warning neither he nor anyone else made any threat, gave any inducement or promise. Inspector Sulaiman was there and others were nearby. Inspector Guan had been with the Anti Drugs Branch since 1980 and confessed to being an experienced officer. He had given evidence in Court many times before and was aware of the various presumptions under the Act. He was the arresting officer in this case. He admitted to the 1st accused being handcuffed at the time the caution was administered, to there being an element of surprise in the circumstances leading to arrest, that the 1st accused was probably shocked and that at the time when he arrested the 2nd accused he was 20 to 30 feet from the 1st accused. Inspector Guan said that he did tell the investigating officer that the 1st accused had made a statement but he Inspector Guan did not record any of these events anywhere although he admitted that the statement was a crucial piece of evidence and police officers carry official diaries. Inspector Guan did not agree that to be fair to the 1st accused he should have waited for his fear to be dispelled. This officer uttered in Court in Hokkien the words he used in administering the caution. He used the word "lu" which is the singular for the word "you". Later in evidence he said that he used the words "lu lang" which is the plural of the word "you". When reminded that he had earlier in evidence used the word "lu" in uttering the caution, he explained that he should have said "lu lang" when addressing the caution to two people but that he had used the singular when addressing the two accused.

Inspector Sulaiman also gave evidence for the prosecution. He heard Inspector Guan speaking in Chinese to both accused. He saw Inspector Guan speaking from a card. Inspector Sulaiman could not understand. He said that when the plastic bag was found he heard Inspector Guan speaking in Chinese and he heard the 1st accused say "Pek Hoon." However he did not hear Inspector Guan using the word "Pek Hoon" when telling the accused that they were being arrested under suspicion of having "Pek Hoon".

Upon conclusion of the trial within trial and after hearing submissions by Counsel on behalf of both accused and the reply of the learned deputy, I ruled that the answer allegedly given by the 1st accused to the question "ini apa" addressed by Inspector Guan was inadmissible in evidence. I ruled so for the following reasons:

1.Counsel for both the accused having put to Inspector Guan that he had not administered a caution at all there was a real doubt in my mind that a caution was in fact administered, notwithstanding Inspector Sulaiman having said that he saw Inspector Guan speaking from a card. The alleged answer by the 1st accused was a vital, if not the most vital, piece of evidence against the 1st accused and might even have gone to incriminate the 2nd accused. Yet Inspector Guan who was an experienced anti drug Officer who should have had on him his diary or notebook admittedly made no record of it. He claimed to have informed the investigating officer of the event but the

investigating officer, Inspector Sahat, in evidence in the trial proper before the trial within trial made no mention of having been so informed nor did he give evidence in the trial within trial. As to the fact of Inspector Guan not making any record as abovestated I follow the decision of Chang Min Tat J (as he then was) in *Sum Kum Seng v. PP* [1981] 1 MLJ 244 at 245. There the learned Judge was addressing himself to the actual words used by an accused person in supplying information that led to the discovery of something and coming within the provisions of s. 27 of the Evidence Act 1950. The Judge said that commonsense stresses the desirability that the actual words of the accused be recorded somewhere. The learned Judge went on to say the record is also as much for the protection of the particular officer concerned, be he the investigating or the interrogating officer, as for the purpose of determining its admissibility. He added:

> We believe all police officers carry note books with them and we see no practical difficulty of any kind hindering any officer interrogating an accused person from jotting in his note book such a vital piece of information, on which the whole case against the accused may depend. It would not take him more than a minute or so. Ideally it should be done at the moment it was made. We appreciate that the immediate concern of the police is to recover the subject-matter of the information but we fail to see how a delay of a minute or so can make any material difference. Afterwards, the officer can refer to this note as the actual information given by the accused leading to the discovery of the fact. The note may, of course, be made afterwards but as we have said, we can see no reason why it should not have been made at the time the information was given and why the police officer should forego the value of a contemporaneous record which goes so far to establish his credit as a truthful witness. So far as the trial Court is concerned, it ought to be realised by all concerned, particularly by the prosecution, that the Courts has a clear duty to admit under s. 27 only that part of the evidence which falls squarely within the provision of a statement leading to the discovery of a fact and that it would be immensely assisted in its task if the prosecution were strictly careful to limit the evidence to the actual statement given.

2. Even if the caution was administered, it was administered in the singular and this would have caused confusion. The accused would have been uncertain as to which of them was being addressed. Inspector Guan admitted to addressing both accused, but in the singular. There was doubt in my mind as to whether the provisions of s. 37A of the Act permit a caution to be addressed to two persons jointly and even if so permitted it could be uttered in the singular when administered to more than one person. The view I take is that *prima facie* each accused should have been separately cautioned.

3. Notwithstanding that Inspector Guan had at the time of the alleged offence been a drug officer for 8 or 9 years he found it necessary to read the prescribed caution (there is nothing complex about it) from a card. He had to translate and utter it in Hokkien. Inspector Guan was from Penang and admitted to speaking Hokkien with a Penang accent and to Hokkien being different from the Hokkien spoken here in the South. In this regard it is significant that in answer to the alleged caution Inspector Guan said that the accused merely nodded. Inspector Guan admitted to not being a qualified interpreter. In this regard I respectfully agree with the *dictum* of Shaik Daud J in *PP v. Mohd. Fuzi b. Wan Teh & Anor.* [1989] 2 CLJ (Rep) 341 at p. 343 that a caution should not merely be read but also explained to the accused along with its consequences. There is no evidence that was done in this case.

4. Assuming the caution was administered, I did not see that it was given in circumstances inviting a voluntary answer. As I see it the Courts are strict in supervising the admissibility of statements alleged to have been made by an accused person and which are sought to be used in evidence to incriminate that person. A leading authority on the point is the case of *Dato Mokhtar Bin Hashim & Anor. v. PP* [1983] 2 MLJ 232. As I understand the judgment in that case before a statement can be admitted in evidence it has to be established beyond reasonable doubt that the statement was made voluntarily, in circumstances under which the accused cannot be said to be oppressed. It is deduced from that case that the person taking the statement should be a person independent of the interrogators or investigators of the case, that the accused should as far as possible be calm and relaxed, properly fed, rested and with his mind at peace. No doubt there should be a cooling off period between interrogation and the recording of the statement. Article 8 of the Constitution provides that all persons are equal before the law and entitled to equal protection of the law. It is trite that there cannot be double standards in the criminal law. In this instance when the 1st accused is said to have provided the incriminating answer, "Pek Hoon", he with the 2nd accused were the subject of arrest by a party of police officers, all around. He was handcuffed at the time and had just been told that he had been arrested under suspicion of being in possession of drugs. The arresting officer himself said that the accused would probably have been in a state of shock. I do not see how it can be argued that those circumstances were not oppressive. Certainly to my mind they were not conducive to a voluntary statement being made. Certainly they could not be matched to the circumstances mentioned and standards required in the *Mokhtar Hashim* case. I do not accept that if the accused did in fact answer, his answer was voluntary.

5. It is significant that given that the alleged admission would have gone to the advantage of the prosecution case, it was not mentioned in the learned deputy's opening speech. It is provided in s. 179(1) of the Code that the officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused. In *Halsbury's Laws of England* 4th Edn., Vol. 37 para. 513 it is stated as follows:

> The object of an opening is to give the Court a general notion of what will be given in evidence. The opening of the case is an occasion of crucial importance and needs to be prepared and presented with great care, skill and deliberation; it informs the Judge about the case and at the same time points to the strength of the plaintiff's case and the weakness of the defendant's case. In his opening, Counsel states what he submits are the issues and questions between the parties which have to be determined, what are the facts of the case, the substance of the evidence he has to adduce and its effect on proving his case, and he will refer to the relevant correspondence between the parties and other documents. He will remark upon any point of law involved in the case, but the opening is not the occasion for detailed argument on legal question or an extensive examination of the authorities. In opening, Counsel may refer to those facts of which the Court takes judicial notice. Neither in the opening nor at the stage of the trial may Counsel assert his personal opinion on the facts or the law, or mention facts which require proof but which it is not intended to prove, or which are irrelevant to the issue to be tried.

Thus it might well be that for the prosecution itself, this evidence was weak and the adducing of it an afterthought, especially seeing that when this case came on for hearing on 17 August, the learned deputy indicated that he would not be seeking to adduce the alleged answer in evidence.

6. As between the evidence of the two Inspectors Guan and Sulaiman there was discrepancy. Inspector Sulaiman did not see Inspector Guan chase the 2nd accused and arrest him. Being a member of the police raiding party, ordinarily he should have seen this if in fact that is what happened. Inspector Sulaiman did not hear the words "Pek Hoon" when Inspector Guan used it in telling the accused that they were arrested under suspicion of having drugs. Inspector Sulaiman was near Inspector Guan at the time and ordinarily should have heard the words spoken if in fact they were so spoken. It had to follow that the credibility of Inspector Guan's testimony relevant to the issue of admissibility in evidence of the answer was in question and I did not accept such evidence.

7. I put to myself the 2 questions recommended by the Supreme Court in *Munusamy v. PP* [1987] CLJ (Rep) 221 at p. 228 and found myself compelled to answer them in the negative if I had to answer them at all, the basis of credible evidence not being there.

The trial proper then proceeded. Inspector Guan went on to say that he seized the plastic bag, directed the two accused to get into the car and escorted by two members of the raiding party he drove the car to the Anti Drugs Branch at Batu Pahat. Inspector Guan said he made a police report.

The homes of both the accused were searched but no incriminating evidence was found. There was no evidence of either accused being examined either as to their person, finger nail clippings, or clothing for traces of heroin. There was no evidence of the plastic bag being examined for finger prints although the chemist who testified said finger prints could be lifted therefrom easily, even by the police without recourse to the chemist or the Department of Chemistry.

Inspector Guan having completed his testimony in the trial proper, the prosecution likewise called Inspector Sulaiman to testify again. The learned deputy told me that this witness would be giving evidence similar to that given in the trial within trial. I had in mind the views expressed by Wee Chong Jin CJ in *Lim Seng Chuan v. PP* [1977] 1 MLJ 171 at p. 174. I did not however see any point in his repeating his evidence again if Counsel agreed that this evidence given at the trial within trial could be referred to in the trial proper, saving of course the evidence ruled to be inadmissible. Both Counsel and the learned deputy agreed to this course subject to Inspector Sulaiman confirming that his evidence given in the trial within trial was true and correct. That being the case and of course there being no jury I took the view that the evidence of this witness need not be repeated but of course could be added to whereafter cross-examination and re-examination would follow in the normal way and at the end of the case for the prosecution I would look at the evidence as a whole excluding the inadmissible evidence. In the event all that Inspector Sulaiman said in the examination-in-chief which followed in the trial proper was that the evidence which he gave in the trial within trial was true. Counsel declined to cross-examine further.

The car was owned by Kang Choo Tiong brother of the 1st accused, (the brother). He had been arrested in connection with this case but was subsequently released. The brother testified to the car being often used by his workers and neighbours and by his father, he being the owner of a motor repair shop. He said that when the car was at the work shop it was always unlocked and that accordingly anyone could open and enter it. The brother added that on the day in question at about 12 noon he drove the car to work and that shortly after noon he returned home because his father wanted to use the car to go to the market to buy vegetables. The brother said that the plastic bag was not his. The father confirmed having

used the car on the day of the alleged offence shortly after noon to go to the market to buy vegetables and that the last time he used the car on that day was a little after 4 O'clock that evening and that thereafter the 1st accused used the vehicle. He said that the plastic bag was not his and that he did not know whether when the car was taken by the 1st accused on the day in question the plastic bag was in the car or not. The father also said that the car was used by the brother, his workers and sometimes also it was borrowed by the father's neighbours and that on the day in question the brother used it as well.

Inspector Sahat, the investigating officer, had given evidence before the trial within trial. He had been given the plastic bag and its contents by Inspector Guan on 24 January 1989 at about 11 p.m. This officer testified to his having placed the plastic bag and its contents in a box and sealing it on 25 January at about 6.40 p.m. and placing it in an iron safe in his office before taking it on 31 January to the chemist in Johor Bahru. There was no evidence as to where the plastic bag was during the period intervening between Inspector Sahat taking delivery of the same from Inspector Guan and his placing them under seal in the box. The chain of evidence relating to the identity of the drug produced in Court should contain no serious break. This has been stated repeatedly by the Supreme Court and as recently as in the case of *Abdul Jalil Bin Abdul Satar v. PP* [1991] 1 CLJ (Rep) 1. As I see it each person constituting a link in that chain should be required to speak in evidence to the safe custody of the drugs whilst in that person's possession. Inspector Sahat did not so speak. Thus the prosecution case was weakened in this regard. Inspector Sahat testified that he wrapped the box and sealed it with the police seal. Yet there was no sign of any police seal on the wrapped box when it was produced in Court and exhibited. It is true that the chemist said that when he received the box it was sealed with the police seal. The chemist said that the police seal or signs of the seal could have been beneath the area where the seals of the Chemistry Department were affixed. Ordinarily there should have been a number of police seals affixed to the wrapped box. It struck me as being extraordinary that there was no sign of any police seal or removal thereof on the wrapping, the exception being a single marking indicating one removed seal. Also Inspector Sahat testified to placing cellophane tapes on parts of the box. No such taping was seen and there were no signs of removal thereof, at the vulnerable points. The same wrapping was used by the chemist, the wrapping having been provided and effected by Inspector Sahat. Here were further unsatisfactory aspects of the prosecution case.

Inspector Guan's police report was exhibited in evidence. It was made at 8.30 p.m. on the day of arrest. It consisted of more than 200 words. It spoke in detail to the events of that day commencing from the raid at 4.30 that afternoon to the conveying of the two accused and the plastic bag to the Anti Drugs Branch at Batu Pahat. In cross-examination Inspector Guan had admitted to the following facts namely that he was an experienced police officer, having lodged many police reports prior to the one in question, being trained as to what matters are to be included in a police report in any given case, that in truth important points had to be entered in his report and that the point about the 2nd accused running away and throwing the keys were important and could have strengthened the police case. Likewise the answer of the 1st accused to the question "Ini apa." Yet there was no mention of any of these matters or of his having administered a caution in the police report. Here then was further proof of Inspector Guan's evidence not being credible.

The chemist found the granules to contain heroin of a net weight as stated in the charge and I accepted that finding.

That then was the case for the prosecution upon which both Counsel submitted that there was no *prima facie* case established upon which either accused should be called upon for their defence.

Counsel for the 1st accused in so submitting emphasized that the plastic bag found on the floor of the car behind the driver's seat, was neither concealed nor kept in a specially constructed compartment of the car which was owned by neither accused. Under these circumstances it was submitted that the presumptions under s. 37 of the Act did not apply. In fact Inspector Guan had said in cross-examination in the trial proper following the trial within trial that the plastic bag was not concealed notwithstanding that it was easy for it to be hidden in the car. The prosecution then conceded that none of the said presumptions applied. It was upon that concession that I proceeded to determine this matter.

Inasmuch as the presumptions under the Act were not being relied on by the prosecution it had to follow that the prosecution was bound to prove by direct evidence the possession of the granules by both accused. It was only then that the presumption of trafficking under s. 37(da)(i) could be said to apply.

The question then was whether on the evidence heretofore led by the prosecution possession of the granules by either or both the accused had been established.

The car belonged to neither of the accused. It belonged to Kang Choo Tiong the brother of the 1st accused. Before the 1st accused used the car at 4 o'clock that day it had been used by his father and his brother and a number of other persons had access to it especially since it was usual to leave the car unlocked. Apart from the fact that the 1st accused was driving the car and the 2nd accused was his passenger in the front seat there was nothing to connect either accused with the car let alone the plastic bag. No personal belongings of either accused were found in the car. Despite body search nothing incriminating was found on them. Despite easy detection no finger nail clippings were taken from either accused for heroin traces nor finger print lifting carried out on the plastic bag. The father said that he did not know whether the plastic bag was in the car or not at the time he used the car. The brother said he did not examine or check the car when he handed it to his father earlier that afternoon. The bag could have belonged to either or both the accused. On the other hand it could have belonged to one or more of the several persons who had access to the car before the 1st accused took delivery of it. Certainly there was a doubt in this regard and of course the benefit of that doubt had to be given to the accused.

As to the accused turning pale in the face and beginning to sweat on being confronted with the plastic bag, in the first place there is no evidence of Inspector Guan having recorded this aspect anywhere. His credibility in other vital areas had been open to question. Even if the accused did react in this way it had to be remembered that they had shortly before been told that they were being arrested under suspicion of being in possession of Pek Hoon. Given those circumstances, to my mind, any normal person would be in a state of panic. It is significant that before being so confronted they acted normally. If they had knowledge of the drugs in the car they would have been pale and sweating as soon as the police pounced on them.

In the end all that was left of the prosecution case was the proximity of the two accused to the plastic bag at the material time. Proximity does not necessarily constitute possession. See the following cases namely *PP v. Lee Sam Thye & Anor*. [1982] CLJ (Rep) 661, *Ong Chong Hin v. Reg.* [1959] 25 MLJ 96 at p. 226 and *PP v. Kau Joo Huat* [1988] 1 CLJ (Rep) 258.

Apart from the question of proximity there was no evidence that either accused knew of the existence of the plastic bag. The two accused being seated in the front, neither of them would necessarily or ordinarily have seen the bag lying on the floor at the back. Even if they did, given the circumstances, neither could reasonably have been expected to enquire about it or its contents. It is significant in this regard that the investigating officer Inspector Sahat admitted that even if one saw the plastic bag on the floor board behind the driver's seat one would not suspect that there was heroin inside. It had to be opened to be discovered. To my mind it would have gone beyond the bounds of propriety, it would have been unduly inquisitive conduct on the part of the accused, assuming the bag not to belong to them, to open it to see what was inside.

On the evidence adduced by the prosecution I find that it could not be deduced that either accused knew of the existence of the bag and even if they did, that they knew of its contents.

There being discrepancy between the evidence of Inspectors Guan and Sulaiman, none of the members of the raiding party was called to testify in support of Inspector Guan's story, not even Sergeant Bujang who assisted in having the 2nd accused handcuffed after his having allegedly run away, then being caught by Inspector Guan whereafter a struggle ensued. Each member of the raiding party was a police officer. Each must have had as a principal object the apprehension of the two accused. That being so their eyes+ would have been rivetted on their quarry. They would have anticipated and observed every moment of the two accused. All, some or at least one of them should have been able to corroborate Inspector Guan's testimony if indeed that testimony was true. That being the case the provisions of s. 114 illustration (g) of the Evidence Act 1950 applied and the Court had to presume that if any of these witnesses had given evidence that evidence would have been unfavourable to the prosecution. It is true that these witnesses were offered to the defence at the end of the prosecution case. That is beside the point. It was for the prosecution to prove their case beyond all reasonable doubt, not for the accused to prove their innocence.

As to the 1st accused, pursuant to s. 180 of the Code I find no case has been made out against him. Even if I was wrong in ruling his answer to Inspector Guan's question "Ini apa" to be inadmissible there is still in my view no case against him because that answer to my mind could have been germinated by his being told by Inspector Guan beforehand that he was being detained under suspicion of having Pek Hoon and not from his own knowledge of the contents of the plastic bag. The weight and value of the alleged answer as evidence is therefore reduced. In any event, as already indicated, I reject the evidence of Inspector Guan in regard to the alleged caution, the question and the answer inasmuch as it was not recorded anywhere when it should have been if in fact these several things did occur.

As to the 2nd accused there is the question of his allegedly having run away when Inspector Guan is said to have shouted "Polis". Again, as already stated, there is no evidence of Inspector Guan having recorded the alleged event in his diary. Certainly he did not state it in his police report and I have grave doubt as to whether the 2nd accused did run away as alleged or at all and throw the keys. Even if he did, the fact standing alone, to my mind, is insufficient to establish a case against him which if unrebutted would warrant his conviction. In this regard his Counsel cited the Indian case of *Matru alias Girish Chandra, Appellant v. The State of U.P., Respondent* AIR 1971 Supreme Court 1950 (V58 C 215) in which it was held that absconding by itself does not necessarily lead to a firm conclusion of a guilty mind, that even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime, such being the instinct of self preservation, that the act of absconding is no doubt a relevant piece of evidence to be considered along with other

evidence but its value would always depend on the circumstances of each case, that normally the Courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction and that it can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused.

As to the 2nd accused also, pursuant to s. 180 of the Code, I find no case has been made out against him.

On the overall evidence led by the prosecution, as I did at the end of the trial within trial, I addressed to myself the 2 hypothetical questions recommended in *Munusamy's* case and after due consideration answered them in the negative, if at all I had to answer them. The basic evidence was not credible.

Both accused are acquitted and discharged.

Also found at [1991] 3 CLJ 2574